Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JACK W LIGON, PETITIONER

v.

RAY LAHOOD, US DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

REBECCA L. FISHER
Counsel of Record

Rebecca L. Fisher & Associates
P. O. Box 417
McGregor, Texas 76657
eshaw@hot.rr.com
254-840-0220

QUESTION PRESENTED

Whether an administrative procedure enacted for one federal agency set forth in 49 U.S.C. 46110(a) (the Act), preempts the Age Discrimination Employment Act (ADEA), which is a remedial statute to be given liberal construction with broad application to protect as many covered individuals as possible, when a federal employee has suffered age discrimination and age retaliation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 6

CONCLUSION 12

APPENDIX

Circuit Court Opinion 1a
District Court Transcript 17a
District Court Order 38a
District Court Judgment 40a
Order Denying Rehearing 41a

TABLE OF AUTHORITIES

Page

CASES

BREEN V. PETERS, 474 F2ND 1, (DDC 2007) 6, 7
CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P. & NBSP; C. V. WELLS, 538 U.S. 400 (2003) 8
JENIFER ARBAUGH V. Y & AGE CORPORATION, 380 F.3RD 219 (5TH CIR. AUGUST 2, 2004) 5
NATIONAL MUTUAL INSURANCE V. DARDEN, 503 U.S. 318 (1992) 8

STATUTES

28 U.S.C. §1254(1) 1
28 U.S.C. §1631 ..... 3, 5, 10
29 U.S.C §633a(a) 1
29 U.S.C §633s 2
49 U.S.C. §44702(d)(1) 8
49 U.S.C. §46110 5
49 U.S.C. §46110(a) ..... *passim*
546 U.S.C. §500 (2006) 5

OPINIONS BELOW

The decision of the court of appeals is reproduced in the Appendix herein at 1a-16a. The decision of the U.S. District Court for the Northern District of Texas, Fort Worth Division is not officially reported is reproduced in the Appendix at 38a - 40a.

JURISDICTION

The judgment of the court of appeals was issued on August 9, 2010. Pet. App. 1a-16a. Petitioner's timely petition for rehearing was denied on October 14, 2010. Pet. App. 41a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISION INVOLVED

29 U.S.C §633a(a)

> "All personnel actions effecting employees or applicants for employment who are at least forth (40) years of age... shall be free from any discrimination based on age."

49 U.S.C. §46110(a)

> "A person disclosing a substantial interest in an order issued by the Administrator of the Federal aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator...may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of

> the United States for the circuit in which the person resides or has its principal place of business."

29 U.S.C §633a

> "all personnel actions effecting employees or applicants for employment who are at least forty (40) years of age... shall be free from any discrimination based on age."

STATEMENT

This case concerns whether or not an act invoking an administrative procedure for one federal agency should be allowed to preempt ADEA. The Petitioner is a Designated Engineering Representative (DER) for the Federal Aviation Administration (FAA) and has been for over twenty-five (25) years. A DER is to be an independent contractor. From 1983 through 2000, seventeen years, the Petitioner maintained his independence. From 2000 to present, FAA began to micro-manage Petitioner, controlled his work performance ability and decision making, controlled his hours of work, controlled his website, controlled his ability to produce income and imposed restraints which controlled Petitioner's job, tasks, and duties. FAA exerted control over the Petitioner to such a degree as to have changed his status from independent contractor to an employee. After years of good service, Mr. Ligon had numerous areas of certification that were decertified because of ongoing age discrimination and age retaliation. The Act grants exclusive jurisdiction to the Court of Appeals for challenges to a FFA Order, such as the decertification of areas of practice. See 49

U.S.C. §46110(a). ADEA grants exclusive jurisdictions for federal employees effected by age discrimination to the District Courts. The Petitioner has always maintained that the control exerted over him changed his status from independent contractor to that of an employee. Therefore, the threshold issue of whether or not Ligon is an employee is necessary to be resolved in order to know what court has subject matter jurisdiction.

The Lower Court found that whether or not the Petitioner was an employee was immaterial. Regardless of his status as an employee or not, the Act preempted ADEA, removing from the Petitioner the right to seek redress under ADEA.[1] Therefore, the Petitioner has been left without the right to proceed in District Court, but he also was not allowed to have the issue of decertification transferred to the Court of Appeals for the Fifth Circuit in accordance with 49 U.S.C. 46110(a) and 28 U.S.C. 1631. Ligon has been left with no remedy and/or avenue to a remedy and ADEA has been preempted by an administrative process applicable to only one federal agency.

1. The Petitioner completed a career as CAA/FAA employee in 1983 and in that same year he became a DER. As a DER he had acquired approximately 540 areas of authority. The Petitioner has at all times conceded that as a DER he was intended to be a independent contractor. He status as

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[1]Both Petitioner and Respondent agree that ADEA confers exclusive jurisdiction to the Federal District Courts for federal employees who have suffered age discrimination and subsequent retaliation.

an independent contract began to change in 2000 when a new supervisor was assigned to him. At such time he was required to do more in order to receive his certification than other DERs. Mr. Ligon was to consult with management first before he made any determinations, his hours of operations were limited, information was taken off of his website, and he was ordered to perform tests that he deemed unnecessary as well as every detail of his work was overseen by his FAA supervisor.

The Respondent's management had made statements about getting rid of the older DERs. Mr. Ligon filed an EEO Administrative Complaint invoking the process exclusively available for federal employees. After Mr. Ligon complained of age discrimination his immediate supervisor put a memo into the Petitioner's personnel file wherein the supervisor sought to have the Petitioner's employment with FAA terminated because he had filed an EEO Complaint. Immediately following the Petitioner's complaint of age discrimination over half of his areas of certification were removed and for the first time in his career with FAA, he was cited as "uncooperative" by FAA management.

2. Based upon the aforementioned control and acts of discrimination, as well as retaliation, the Petitioner continued in the EEO Administrative process available to federal employees. At the exhaustion of the Administrative process, the Petitioner filed in Federal District Court asserting violations of ADEA.

The District Court acknowledged in accordance with *Jenifer Arbaugh v. Y & Age Corporation*, 380 F.3rd 219, No.03-30365 (5th Cir. August 2, 2004) reversed on other grounds, 546 U.S.C. 500 (2006), that control is the most important factor in determining the Petitioner's employment status. The District Court determined in an Order granting the Respondent's Motion for Summary Judgment that the Petitioner was not an employee recognized by ADEA. Petitioner was not allowed to go to trial on the issue of whether or not he was an employee, although there were declarations from the Petitioner and other witnesses that he was no longer independent, but under the absolute control of FAA.

The Petitioner then requested the District Court in accordance with 28 U.S.C. §1631 and 49 U.S.C. 46110 to have the issue of decertification transferred to the Fifth Circuit Court of Appeals for review. The District Court denied the Petitioner's request.

3. The Petitioner timely appealed to the Lower Court, the Court of Appeals for the Fifth Circuit. The Lower Court determined that it was irrelevant whether the Petitioner was an employee. The Petitioner at all times has maintained that the determination of his employment status was a threshold issue that had to be resolved in order to determine which court had subject matter jurisdiction. ADEA mandates that a federal employee fulfil the Administrative process regarding an age discrimination complaint, then proceed to Federal District Court.In accordance with ADEA that was the only avenue available to the Petitioner, unless it was determined that he was not an employee. At such time, and only at

such time as a determination that he was not an employee, the Petitioner should have been able to transfer to a Court of Appeals for review of his decertification. The Lower Court eviscerated ADEA by determining that regardless of whether or not the Appellant was an employee he did not have the right to proceed under ADEA for his age discrimination and age retaliation claims, which had resulted in massive decertification of his areas of practice.[2]

REASONS FOR GRANTING THE PETITION

The decision below effectively eviscerates ADEA. The Act grants exclusive jurisdiction to the Court of Appeals for challenges to an FAA Order. 49 U.S.C. §46110(a). Likewise, ADEA grants exclusive jurisdiction to the District Courts in regards to age discrimination inflicted upon a federal employee and/or a former federal employee. Therefore, both the Act and ADEA grant exclusive jurisdiction, one to the Appellant Courts and one to the District Court respectively.

In *Breen v. Peters*, 474 F2nd 1, (DDC 2007), the Plaintiffs filed suit in 2005 alleging that FAA had discriminated against them by targeting their jobs for outsourcing and terminating their federal employment in violation of ADEA. In that case, the government filed a Motion to Dismiss for Lack of Jurisdiction and a Motion for Summary Judgment, Motions such as Respondent filed in this case.[3] The Respondent argued

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[2]After the determination by the lower court in this case, the Court of Appeals for the Fifth Circuit determined in *Jones v. FAA*, Case No. 09-11239 that Title VII was also preempted by the Act.

that in their Motion to Dismiss in *Breen*, as they argued in the case now before the Court, that the ADEA claims were an impermissible collateral attack and that the decisions at issue could only be reviewed by the Court of Appeals. Respondent's argument did not prevail in the *Breen* case. The District Court was found to have jurisdiction, because a claim of age discrimination is not inescapably intertwined and that the ADEA claim was properly before the District Court. (*Id., pg. 7).* In *Breen*, the test as to whether an exclusive administrative jurisdiction provision precludes a District Court from hearing a given claim, was if the administrative agency had the authority to decide the issue raised by the claim. (*Id., pg. 5).* FAA does not have the authority to hearing a complaint of age discrimination (*Id., pg. 7).* In the *Breen* case, the District Court refused to eviscerate ADEA and the purposes of ADEA.

1. LIGON'S STATUS AS AN EMPLOYEE IS RELEVANT

It is relevant whether or not Petitioner is an employee, for it indeed determines whether the Act applies or ADEA applies to his cause of action. As noted before, both the Act and ADEA grant exclusive

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[7]The Respondent at first argued that the District Court did not have subject matter jurisdiction and that subject matter jurisdiction was solely with the Court of Appeals pursuant to 49 U.S.C. 46110(a). Respondent changed their position regarding subject matter jurisdiction while the case was at the Court of Appeals for the Fifth Circuit. At that time, the Respondent asserted that ADEA confers exclusive jurisdiction to the Federal District Courts for federal employees asserting age discrimination and age retaliation.

jurisdiction, one to the Appellant Courts and one to the District Courts respectfully. The determination of employment status would likewise determine which Court has subject matter jurisdiction.

DERs were not meant to be employees, but qualified private persons. An FFA administrator "May delegate to a qualified **private person**". (*Emp. Added).* (*See* 49 U.S.C. §44702(d)(1), 44704). Furthermore, the Act states "**A person** disclosing a substantial interest in an order issued by the administrator may petition an appellant court for review." (*Emp. Added).* 49 U.S.C. §46110(a). The Act's language clearly indicates that it addresses **persons** and not employees.

In contrast, ADEA applies to individuals who are or were an employee subjected to age discrimination and/or retaliation. Therefore, the determination of whether the Petitioner is an employee remains relevant.

Mr. Ligon filed in District Court under ADEA due to the control that had been asserted over him by FAA, thus changing his employment status. There is no bright line test of when an individual becomes an employee. In the *Darden Test Hybrid* the highest and most probative item on the *Darden* test is the extent of control of the means and methods by which an individual performs his job and produces his product. *See National Mutual Insurance v. Darden*, 503 U.S. 318 (1992). Furthermore, this Court found in *Clackamas Gastroenterology Associates, P. & NBSP; C. v. Wells*, 538 U.S. 400 (2003) the common-law element of control is the principal guidepost for

determining whether an individual is an employee. The Petitioner set forth evidence of the extensive control FAA had exerted over his work starting in 2000. He was never allowed to proceed to trial on the issue of his employment status at District Court, but it was determined in Summary Judgment that he was not an employee. The Lower Court then found that it was irrelevant whether he was an employee, because they determined the Act preempts ADEA, whether he is deemed an employee or not deemed to be an employee.

2. LOWER COURT IMPROPERLY USED *BIVENS* CASE LAW.

The case law relied on by the Lower Court to eviscerate ADEA was *Bivens* case law. A *Bivens* cause of action is a constitutional tort claim, which has been created by the courts and exist if and only if there is no other remedy available when there has been a constitutional harm. There is no statutorily granted exclusive jurisdiction for a *Bivens* claim. An employee who has suffered discrimination cannot file a *Bivens* constitutional tort against management officials. A *Bivens* claim would be precluded by either Title VII and/or ADEA. The lower court took case law wherein the Act preempted a *Bivens* claim and applied it to determine that the Act then preempts ADEA. It was improper for the Lower Court to apply *Bivens* case law to an ADEA cause of action for the purposes of dismissing an ADEA claim.

3. SUBJECT MATTER JURISDICTION REMOVED FROM THE DISTRICT COURT ENDOWED BY ADEA

Both the Petitioner and the Respondent agree at this time that ADEA confers exclusive jurisdiction to the Federal District Courts for federal employees who have suffered age discrimination and subsequent retaliation. Likewise the Act grants exclusive jurisdiction to the Court of Appeals for challenges to FAA Orders.

Petitioner has always asserted and continues to assert, that there is a threshold issue of whether or not he is an employee. If he is an employee, the exclusive cause of action is recognized under ADEA and exclusive jurisdiction lies with the District Court. If he is not an employee, then the Act applies exclusive jurisdiction for review of his decertification by an Order of FAA to the Court of Appeals. The Lower Court's determination is that if there is an FAA Order, there can never be an age discrimination case filed under ADEA. Such a determination eviscerates the purpose and intent of ADEA. Furthermore, the Lower Court allowed a narrow statute applying to only one agency to preempt a much more broadly applied statute implemented for remedial purposes.

The Lower Court then did not allow the transfer of the issue of the Agency's orders decertifying Petitioner's areas of authority to the Court of Appeals for the Fifth Circuit in accordance with 49 U.S.C. 46110(a) and 28 U.S.C. 1631. *If* it is determined that the District Court does not have subject matter jurisdiction, either because the Petitioner is not

determined an employee and therefore ADEA does not apply or as the Lower Court decided that the Act preempts ADEA, then the issue of decertification should have been transferred to the Court of Appeals for review, since the Petitioner was timely in all regards to his ADEA cause of action.

4. THE RESULT OF THE LOWER COURT'S DECISION

The Lower Court's decision to preempt ADEA, a statute protecting an aging American workforce, wherein the youngest baby boomers are at least fifty (50) years of age, puts the protections set in place by ADEA at risk. It gives a free "get out of jail" ticket to the FAA to engage in discrimination and retaliation, by merely framing what they have done as an Order. The *Breen* case indicates how the FAA can assert that their discriminatory actions are an order subject only to 49 U.S.C. 46110(a). The Lower Court's decision weakens ADEA, when the American workforce, including federal employees, are aging and are in need of ADEA's protections.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Rebecca L. Fisher
Counsel of Record
Rebecca L. Fisher &
Associates
P. O. Box 417
McGregor, Texas 76657
254-840 0220

No. 09-10860
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JACK W LIGON,
Plaintiff - Appellant

v.

RAY LAHOOD, U S Department of Transportation - Federal Aviation Administration,
Defendant - Appellee

August 9, 2010, Filed

Appeal from the United States District Court for the Northern District of Texas.

COUNSEL: For JACK W LIGON, Plaintiff - Appellant: Rebecca Leona Fisher, Rebecca L. Fisher & Associates, McGregor, TX.

For RAY LAHOOD, U S Department of Transportation - Federal Aviation Administration, Defendant - Appellee: Donna Kathleen Webb, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Fort Worth, TX.

Before JOLLY, SMITH, and OWEN, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Jack Ligon appeals the district court's dismissal of his claim under the Age Discrimination in Employment Act (ADEA). The district court dismissed Ligon's ADEA

challenge to a Federal Aviation Administration (FAA) order reducing his areas of authority as a Designated Engineering Representative (DER) because it concluded that Ligon, as a DER, was not an FAA employee within the meaning of the ADEA. Although this may be true, we conclude, more fundamentally, that the district court lacked jurisdiction to address Ligon's ADEA claim because that claim was inescapably intertwined with a challenge to the FAA order itself, and the courts of appeals, not the district courts, have exclusive jurisdiction over such challenges. Accordingly, we reverse in part, affirm in part, and remand with instructions for the district court to dismiss Ligon's claim for lack of subject matter jurisdiction.

I.

Under the Federal Aviation Act, the FAA Administrator "may delegate to a qualified private person" the authority to undertake the "examination, testing, and inspection necessary" to issue certificates identifying aircraft as compliant with FAA regulations. 49 U.S.C. §§ 44702(d)(1), 44704. The Administrator, through local Aircraft Certification Offices (ACOs), appoints independent contractors, called DERs, to perform these tasks. 14 C.F.R. § 183.11(c)(1). DERs, though certified by the FAA, are hired by the private aircraft industry to inspect private airplanes. A DER may have several authorized areas of expertise, and may only approve or recommend approval of technical data within his delegated authority by submitting to the FAA a Statement of Compliance with the Federal Aviation Regulations (FAA Form 8110-3). Each DER is subject to oversight by the FAA, and the ACO is

responsible for providing oversight of the DERs within its region. The FAA may rescind DER appointments, or choose not to renew them, at "any time for any reason the Administrator considers appropriate." 49 U.S.C. § 44702(d)(2); 14 C.F.R. § 183.15(b).

DER certificates are renewed annually. The renewal process is conducted by an Advisor employed by the FAA and appointed to the DER. The Advisor reviews the activity the DER completed during the year in each of his designated areas. This review is accomplished by submission of a report of activity by the DER in annual renewal documents, or through review of the FAA Form 8110-3s submitted by the DER during the course of the year. The Advisor is assisted in his review by the findings and recommendations of Evaluators, who have expertise in areas outside the Advisor's expertise and who review the DER's activities in those areas. *See* FAA Order 8100.8B P 905 (July 14, 2003).

Ligon was appointed a DER in 1983 after retiring from the FAA. From 1983 until 2002, he accumulated more than 540 areas of delegated authority. Prior to 2001, Ligon's annual renewal process was simple, requiring only two to three hours each year for Ligon to complete the necessary paperwork. This began to change, however, during the annual renewal process in 2001. Ligon's Advisors, Bill Vickers during 2001-2002 and then Jim Rankin from 2003 forward, required Ligon to indicate, in a format of his choice, how many FAA Form 8110-3s were issued by him each year in his designated areas. Ligon resisted this additional work, and sought new Advisors who did not require him to report his activities.

In 2003, Ligon once again resisted his Advisor's request for a list of his activities during the year, but eventually provided a rudimentary summary. Ligon's list failed to show any activity in helicopters. During the 2004 renewal process, Ligon again failed to submit any record showing activity in helicopters. He also failed to report any activity in the areas of mechanical or electrical equipment. Ligon was notified that if he did not show activity in these areas in the next year his delegated authority in these areas would not be renewed. Ligon responded by writing letters to Fran Cox and Fred Stellar of the FAA, complaining of retaliation and harassment. After receiving no satisfactory response to his complaints, Ligon subsequently filed the first of three separate complaints with the EEOC on September 8, 2004.

During the 2005 renewal process, Ligon again failed to show activity in helicopters, mechanical equipment, or electrical equipment. Consequently, his Advisor, Jim Rankin, removed 226 of Ligon's areas of authority for "non-use." Because of continued inactivity, Ligon's areas of authority were further reduced by an additional 88 areas of authority on April 29, 2008. Ligon again contacted Fran Cox of the FAA with his concerns, and filed a third complaint with the EEOC in June 2008.

On July 28, 2008, approximately 90 days after learning of the FAA's decision to further reduce his areas of authority, Ligon filed suit in federal district court, alleging that the FAA's handling of his renewal process and failure to renew his areas of authority were discriminatory and violated his Fifth Amendment due process rights. He sought reinstatement of his areas of

delegated authority, damages pursuant to the ADEA, and injunctive relief pursuant to the ADEA and the Fifth Amendment. After a telephonic hearing on July 24, 2009, the district court dismissed the Fifth Amendment claim based on Ligon's counsel's acknowledgment that it lacked merit. The court granted the Government's motion for summary judgment on the ADEA claim, holding that Ligon had failed to adduce evidence that he was at any time an employee of the FAA. Having decided the case on this basis, the district court concluded that it need not make any decision as to the other issues raised in the FAA's motion for summary judgment and motion to dismiss, including the FAA's assertion that the court lacked subject matter jurisdiction.

Ligon filed a motion to amend judgment, seeking a transfer of his suit to the Fifth Circuit Court of Appeals pursuant to 49 U.S.C. § 46110(a) and Federal Rule of Civil Procedure 59(e). The district court denied this motion. Ligon filed a timely notice of appeal. This court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

II.

Before reaching the merits of Ligon's ADEA claim, we must consider whether we have jurisdiction to consider it. If the district court lacked subject matter jurisdiction over the ADEA claim, we have jurisdiction "merely for the purpose of correcting the error of the lower court in entertaining the suit." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986). Neither party now challenges the district court's jurisdiction over Ligon's ADEA claim, but "subject matter delineations must be

policed by the courts on their own initiative." *Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999). We review questions of subject matter jurisdiction *de novo*. *Paulsson Geophysical Svcs., Inc. v. Sigmar*, 529 F.3d 303, 306 (5th Cir. 2008).

Section 46110(a) of the Federal Aviation Act (the Act) vests the courts of appeals with jurisdiction over challenges to FAA orders:

a person disclosing a substantial interest in an order issued by ... the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator ... may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business.49 U.S.C. § 46110(a).[1] For the purposes of the Act, the term "order" "has been given expansive construction," but to be reviewable the order must be final, and there must be an adequate record for judicial review. *Atorie Air, Inc. v. Federal Aviation Admin.*, 942 F.2d 954, 960 (5th Cir. 1991). To be sufficiently final, the order "need only be an agency decision which imposes an obligation, denies a right, or fixes some legal relationship." *Id.* at 960 (internal quotation omitted).

The FAA asserts, and Ligon does not contest, that the FAA's notification of its nonrenewal of his designations is an appealable final order pursuant to the statute. We agree that it is. The letters to Ligon terminating certain delegations of authority clearly deny a right and

fix a legal relationship between Ligon and the FAA by terminating his ability to examine, test, and inspect in those areas of authority. The record of the decision not to renew Ligon's delegations of authority consists of all of the information reviewed by the FAA before the non-renewal decisions, including Ligon's Evaluators' recommendations and performance evaluations, the summary of activity submitted by Ligon, and the letters to Ligon informing him of the nonrenewal of certain delegations. *See Green v. Brantley*, 981 F.2d 514, 519 (11th Cir.1993)(holding that an FAA order revoking a certificate of authority was a final order under the Act); *Gaunce v. De Vincentis*, 708 F.2d 1290, 1292-93 (7th Cir. 1983)(holding that an FAA order revoking the plaintiff's airman certificate could not be collaterally attacked in federal district court).

It is well settled that the review of any order of the FAA Administrator must be taken in a court of appeals. *See, e.g., Zephyr Aviation, L.L. C. v. Dailey*, 247 F.3d 565, 571 (5th Cir. 2001) ("The United States Courts of Appeal . . . have 'exclusive jurisdiction to affirm, amend, modify or set aside' orders of the NTSB or the FAA.")(quoting 49 U.S.C. § 46110(c)); *Merritt v. Shuttle, Inc. (Merritt II)*, 245 F.3d 182, 192 (2d Cir. 2001)("Statutes such as Section 46110 . . . preclude district courts from deciding issues that 'could and should have been' raised in an administrative proceeding or at least in a court of appeals, not merely those that were actually considered and necessarily decided in the administrative proceeding.")(quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 339, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958))). Specific grants of jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts. *Leal*

v. Szoeke, 917 F.2d 206, 207 (5th Cir. 1990) ("[W]here Congress has provided for review jurisdiction in the court of appeals, jurisdiction there is exclusive."); *accord Carpenter v. Dep't of Transp.*, 13 F.3d 313, 316 (9th Cir. 1994); *Oling v. Air Line Pilots Ass'n*, 346 F.2d 270, 276 (7th Cir. 1965) ("[W]here Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive."), *cert. denied*, 382 U.S. 926, 86 S. Ct. 313, 15 L. Ed. 2d 339 (1965).

Moreover, district courts lack jurisdiction not only over direct challenges to FAA orders, but also over damages claims that are "inescapably intertwined with a review of the procedures and merits surrounding an FAA order." *Zephyr Aviation*, 247 F.3d at 572 (internal quotations and alterations omitted); *see also, e.g., Green v. Brantley*, 981 F.2d at 521. That is, a plaintiff may not circumvent the exclusive jurisdiction of the court of appeals by collaterally attacking an administrative order in a federal district court. *Id.* In *Zephyr Aviation*, we recognized that "parties may not avoid administrative review simply by fashioning their attack on an FAA decision as a constitutional tort claim against individual FAA officers." 247 F.3d at 572. We ultimately concluded, however, that the district court did have subject matter jurisdiction in that case because the plaintiff's claims "d[id] not relate to an FAA order currently pending against it"; the only order against Zephyr had been retracted, and the plaintiff's challenge was to alleged extra-procedural actions by FAA inspectors. Id. at 572-73. We distinguished the holdings of other circuits, which concluded that *Bivens* challenges to FAA officials' actions surrounding the issuance of an order were precluded by § 46110, by

noting that Zephyr Aviation's claim did not "implicate an FAA order that [was] currently in place" and therefore "could not function as a collateral attack on an FAA order or action." *Id.* at 572.

We later applied *Zephyr Aviation* in an unpublished decision, *Dresser v. Ingolia*, 307 F. App'x 834 (5th Cir. 2009), to conclude that the district court lacked jurisdiction over a challenge to an administrative order. In that case, mariners whose licenses had been revoked by administrative law judges of the Coast Guard alleged improprieties in their adjudications and sought money damages pursuant to *Bivens*. *Id.* at 835-36. We held that "the district court lacked subject matter jurisdiction over the plaintiffs' *Bivens* claims because such claims were inescapably intertwined with a review of the procedure and merits surrounding their respective [adjudications]." *Id.* at 843. The allegations of improprieties "necessitate[d] a review of the ALJs' decision making and the merits of each plaintiffs' arguments regarding whether his license should have been revoked" and, therefore, "exercising jurisdiction over such claims circumvents administrative review through suit in federal court." *Id.* (internal quotation omitted).

Other circuits addressing a district court's jurisdiction over a *Bivens* challenge to an order administered under the Act have reached the same conclusion. *See, e.g.*, *Gaunce v. De Vincentis*, 708 F.2d at 1293 ("The statutorily prescribed requirements cannot be dispensed with merely because the administrative proceeding dealt with an agency's proof of specified regulatory violations, while appellant is raising a due process constitutional claim in the judicial

proceeding."); *Tur v. Federal Aviation Administration*, 104 F.3d 290, 292 (9th Cir. 1997) ("Tur's suit presents a collateral challenge to the merits of his previous [administrative] adjudication. Section 46110 does not permit such suits."). In *Green*, for example, the Eleventh Circuit addressed the plaintiff's allegations under *Bivens* that FAA officials had revoked his pilot examiner certificate based on allegedly false accusations. *Id.* The court concluded that the district court lacked jurisdiction over the claim because the FAA's termination of Green's certificate was an appealable order that conferred exclusive jurisdiction on a federal court of appeals. *Id.* at 519-21. The court reasoned that "[t]he merits of Green's Bivens claims [were] inescapably intertwined with a review of the procedures and merits surrounding the FAA's order." *Id.* at 521.

Similarly, in *Merritt v. Shuttle (Merritt I)*, 187 F.3d 263, 266, 271 (2d Cir. 1999), the Second Circuit held that a district court lacked subject matter jurisdiction over a pilot's *Bivens* claim because the statutory scheme provided for exclusive review directly in the court of appeals. The pilot in *Merritt I* alleged that FAA officials had "failed to conduct a meaningful investigation and instead conspired to conceal their own negligence" by blaming the plaintiff for flying in bad weather. *Id.* at 266. The court reasoned that the pilot's Fifth Amendment due process claim was "'inescapably intertwined' with review of the revocation order" and that, despite plaintiff styling his *Bivens* claim in constitutional terms, he was ultimately disputing "the ALJ's factual conclusion that he bore responsibility for an ill-considered decision to take off." *Id.* at 271. The *Merritt I* court held that the necessity of this analysis

deprived the district court of jurisdiction, because Merritt's claim would "result in new [district court] adjudication over the evidence and testimony adduced in the prior revocation hearing, the credibility determinations made by the ALJ, and, ultimately, the findings made by the ALJ" during the course of the proceedings. *Id.* (footnotes, internal quotation marks, and alterations omitted).

On the other hand, some courts have addressed challenges to FAA action that they held not to be "inescapably intertwined" with an administrative order. In *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994), for instance, the Ninth Circuit held that the district court did have jurisdiction over the plaintiff's claims because they were "not based on the merits of his individual situation, but constitute[d] a broad challenge to allegedly unconstitutional FAA practices." *See also Foster v. Skinner*, 70 F.3d 1084, 1088 (9th Cir. 1995) (holding that although courts of appeals have exclusive jurisdiction over claims that are "inescapably intertwined" with a challenge to a particular final order, "a district court has subject matter jurisdiction over broad constitutional challenges to FAA practices."). In *Merritt II*, after having disposed of the plaintiff's *Bivens* claim in *Merritt I* as described above, the Second Circuit held that Merritt's claim of negligence under the Federal Tort Claims Act (FTCA) was *not* precluded by § 46110. 245 F.3d at 191. Merritt's FTCA claim alleged that FAA employees had negligently provided him with inaccurate weather information, causing him to take off in a storm, which was the reason his pilot's certificate was revoked. The court distinguished Merritt's complaints about the behavior of the FAA employees prior to takeoff, which were not

precluded by § 46110, from his complaints under *Bivens* about the behavior of FAA employees in issuing an order suspending his pilot's certificate, holding that only complaints resulting from the *order itself* could be precluded by § 46110. *Id.* at 189-90. *See also Beins v. United States*, 695 F.2d 591, 598, 224 U.S. App. D.C. 397 & n.11 (D.C. Cir. 1982) (holding that the precursor to § 46110 did not preclude a district court's jurisdiction over a pilot's negligence claim against the FAA because review in the court of appeals would be "distinct conceptually" from review for negligence).

We conclude that Ligon's ADEA claim is inescapably intertwined with a challenge to the procedure and merits of the FAA's decision not to renew his designations of authority.[2] Like the challenges in *Green*, *Merritt I*, and *Dresser*, Ligon's challenge requires a review and balancing of the same evidence used by the FAA in deciding not to renew his areas of authority, and is essentially a challenge to the merits and procedure of a particular order that is currently pending against Ligon.[3] Further, the relief Ligon seeks--reinstatement of his areas of authority--cannot be granted by a district court reviewing an ADEA claim. *See* § 46110(c) (granting the courts of appeals "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order."). Ligon's claim therefore "could and should have been" raised initially with a court of appeals according to § 46110. *See Merritt*, 245 F.3d at 192 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 339, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958)).[4] Accordingly, we conclude that § 46110 precluded the district court from exercising subject matter jurisdiction over Ligon's claims relating to the FAA's nonrenewal of his areas of authority.[5]

III.

For the foregoing reasons, we REVERSE the district court's grant of summary judgment with regard to Ligon's claim that the nonrenewal of his areas of authority violated the ADEA, REMAND with instructions to enter judgment that, consistent with this opinion, dismisses such claim for lack of subject matter jurisdiction, and AFFIRM the grant of summary judgment with regard to any remaining ADEA claims.

REVERSED and REMANDED in part, and AFFIRMED in part.

Footnotes

1This jurisdictional grant was previously codified at 49 U.S.C. § 1486(a) (1992).

2Ligon's complaint makes several factual allegations that do not directly relate to the nonrenewal of his delegations of authority, including the removal of his name from the FAA's online directory of DERs and occasions on which he was required to perform extra work. To the extent that these allegations constitute claims of discriminatory adverse employment actions under the ADEA, they were not precluded by § 46110 because they could not have been raised in a challenge to a particular order. The district court accordingly had subject matter jurisdiction over any such claims. However, the district court correctly granted summary judgment on such claims because Ligon failed to adduce sufficient evidence that he was an employee of the FAA according to the factors articulated in *Arbaugh v. Y &*

II Corp., 380 F.3d 219, 226 (5th Cir. 2004), *rev'd on other grounds*, 546 U.S. 500, 504, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006), and *Spirides v. Reinhardt*, 613 F.2d 826, 831, 198 U.S. App. D.C. 93 (D.C Cir. 1979). We therefore affirm the district court's grant of summary judgment to the extent it applies to allegations under the ADEA not related to the FAA's order.

3Because the ADEA does not authorize a mixed-motive age discrimination claim, *Gross v. GBL Fin. Svcs., Inc.*, 129 S. Ct. 2343, 2350, 174 L. Ed. 2d 119 (2009), Ligon's ADEA claim would fail once it was determined that the FAA order reducing his areas of authority was warranted. That is, his ADEA challenge does not raise any issues that could not be addressed by a court of appeals in reviewing the merits and procedure of the order itself.

4Ligon and the FAA argue that this case is distinguishable from the cases concluding that *Bivens* claims were precluded by § 46110, because Ligon brought his challenge to the FAA order under the ADEA. No circuit courts have addressed whether an ADEA claim could constitute a collateral attack on an FAA order. *But see Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 643 (2d Cir. 1985) (abrogated on other grounds) (holding that a district court did have jurisdiction over an ADEA challenge to an integrated seniority list formulated in an airline merger and approved by the Civil Aeronautics Board, even though CAB orders are appealable only to the courts of appeals, where the CAB could not have addressed the age discrimination claim). One district court has concluded that an ADEA claim was not inescapably intertwined with a challenge to an FAA

order, but in that case the challenge was to personnel actions separate from the FAA order. *Breen v. Peters*, 474 F. Supp. 2d 1, 6 (D.D.C. 2007). The FAA argues that the *Bivens* cases are distinguishable because of the Supreme Court's hesitation to expand the judicially created *Bivens* remedy into new contexts. *See Schweiker v. Chilicky*, 487 U.S. 412, 421, 108 S. Ct. 2460, 101 L. Ed. 2d 370 (1988). But expansion of the *Bivens* remedy is irrelevant here, where the question is circumvention of the exclusive jurisdiction set forth by Congress. *See Zephyr Aviation*, 247 F.3d at 572. Instead, what matters is whether the challenge is inescapably intertwined with a challenge to the order, and would therefore undermine Congress's intention that FAA orders be reviewed in a certain way. *Accord Carpenter*, 13 F.3d at 316 (holding that exclusive jurisdiction in the courts of appeals under the Hobbs Act overrides the Rehabilitation Act's provision of jurisdiction in the district court).

5Ligon asserts that the district court erred in failing to transfer his case to this court pursuant to 28 U.S.C. § 1631 and 49 U.S.C. § 46110, and alternatively requests that we exercise jurisdiction over the case on those grounds. Section 1631 provides that if a court finds that it lacks jurisdiction over an action or appeal, it shall, in the interests of justice, transfer it "to any other such court in which the action or appeal could have been brought at the time it was filed or noticed." 28 U.S.C. § 1631. Even if his ADEA claim could be construed as a challenge under the Federal Aviation Act, § 46110 requires a petition for review of an FAA order to be filed within 60 days of the order, and Ligon's claim in the district court was filed 90 days after the FAA's most recent order. He has provided no reasonable

grounds for his failure to file by the 60th day, so § 1631 cannot save him from the procedural requirements of § 46110.

CIVIL ACTION N0. 4:08-CV-441-A
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

JACK W. LIGON,
Plaintiff,

VS.

RAY LaHOOD, SECRETARY OF DEPARTMENT OF TRANSPORTATION, (FEDERAL AVIATION ADMINISTRATION) AND THE UNITED STATES OF AMERICA,
Defendants .

July 24, 2009 10:30 a.m.

TRANSCRIPT OF PROCEEDINGS

(Conference Call Hearing) BEFORE THE HONORABLE JOHN H. McBRYDE UNITED STATES DISTRICT JUDGE

***

PROCEEDINGS,

THE COURT: We're on the line. This is a conference call hearing in No. 4:08-CV-441-A. The style is Jack W. Ligon, plaintiff, versus Ray LaHood, Secretary of Department of Transportation, Federal Aviation Administration, and the United States of America.

Let's see, Ms. Fisher, you're on the line for the plaintiff ?

MS. FISHER: Yes, Judge, I am.

THE COURT: And, Ms. Webb, you're on the line for the defendants?

MS. WEBB: Yes, Your Honor.

THE COURT: Is anyone else on the line? If so, speak up .

(No response .)

THE COURT: Apparently not. I have with me the court reporter, who is taking this down, and Marjorie Panter, who is working with me on the case.

I have before me a motion to dismiss filed by the defendants and a motion for summary judgment and I wanted to see how much we could resolve as to the issues raised by those motions by way of a conference such as this, and to whatever extent we aren't able to resolve things, at least narrow the issues down.

Ms. Fisher, you can help me on something at the outset. The complaint alleges two different causes of action, one for age discrimination and retaliation and the other for U.S. Constitution due process, and apparently that's an allegation that your client's Fifth Amendment rights were violated. I notice that the government directs its attention to both of those causes of action in its motion to dismiss and seems to have valid reasons, at least for dismissal of the Fifth Amendment due process cause of action.

I notice that you don't respond to the government's argument on that subject in your response to the motion to dismiss, nor is the Fifth Amendment even mentioned in the summary judgment

papers, as far as I can tell. Are you still pursuing that, Ms. Fisher, on behalf of your client?

MS. FISHER: No. What we were going to do, and I had spoken to my client and I thought I had put it in there on a footnote, we would ask for leave of court to go ahead and withdraw that particular claim.

THE COURT: Okay. Well, I must have missed that. Was it in a footnote?

MS. FISHER: I sure thought I had it, but you know how it is. I was -- unless something went on that I didn't realize, but I thought so, Judge.

THE COURT: Well, it may be in there and I overlooked it. Well, I'll dismiss -- I think probably from a procedural standpoint probably the proper thing for me to do would be to grant the motion to dismiss as to -- was it Count 2? I believe is how you designate it.

MS. FISHER: I believe so.

THE COURT: Well, it's not by counts. It's paragraph Roman V of the complaint under the heading U.S. Constitution - Due Process. So I'll grant the motion to dismiss as to those claims so the only claim pending that we need to deal with in this telephone conference hearing is the cause of action that's in paragraph Roman IV.

MS. FISHER: The age and retaliation.

THE COURT: Yes. I was going to say on what page, but apparently you don't have a numbering

system in your computer to number pages on your documents, do you?

MS. FISHER: Well, I normally do.

THE COURT: Okay. Well, I can't tell you what page it is.

MS. FISHER: Okay.

THE COURT: It's paragraphs 46 through 49 of the complaint, so we'll talk about that now. I've read all of the cases that either of you cited, and a few others, trying to come to a final conclusion on the motion to dismiss the age discrimination and retaliation claim based on the provision that gives the -- statutory provision that gives the Court of Appeal either in Washington, D.C., or the Fifth Circuit exclusive jurisdiction. And, unfortunately, I don't know that the court decisions are as clear cut as maybe the government would like for them to be. I'm talking about Section 46110 of Title 49 and, in particular, I think the (c) part of that section says that the circuit court will have exclusive jurisdiction to amend, affirm, modify,or set aside .

There are some case authorities that would seem to indicate rather strongly that that's the case and that these discrimination and retaliation claims can't be raised in this court.

Ms. Webb, you can help me on something.

MS. WEBB: I'll sure try, Your Honor.

THE COURT: Let's suppose that either -- I think I could transfer it to the Court of Appeals for the

Fifth Circuit or the D.C. Circuit, I suppose, if I wanted to. There's a statute that authorizes the Court to transfer cases to where it could have been filed and should have been filed. Or I could dismiss it. But either way let's assume it would end up in the Fifth Circuit. If it ended up in the Fifth Circuit, how would the Fifth Circuit resolve the fact issues on an ADEA claim if there is such a claim?

Now, I'm assuming for the purpose of this discussion that Mr. Ligon was an employee of the government. There's a serious question about that, and I'll discuss that in a minute. But I'm talking about the ground of the motion to dismiss based on exclusive jurisdiction.

MS. WEBB: Yes, Your Honor.

THE COURT: How would the Fifth Circuit resolve. Let's assume there are fact issues. I'm not sure there are. I question that there are, but let's assume there are fact issues. How would the Fifth Circuit resolve those?

MS. WEBB: Well, Your Honor, I believe that the reasoning for the nonrenewal was based on inactivity in the areas. That would be the exact defense we're giving in the age discrimination claim as a legitimate, nondiscriminatory reason. If the Fifth Circuit finds that we have substantial evidence to support that, then our legitimate, nondiscriminatory reason is established. We should be looking as if this was a -

THE COURT: How is the Fifth Circuit going to determine whether you have substantial evidence? Is it going to have a trial?

MS. WEBB: Your Honor, I think it's based on the record, and I think it's on the letters that were given notice and et cetera, et cetera. I'm not sure if they would have an oral argument or not, or if there would be a -

THE COURT: Well, you have the letter saying that he didn't have activity in those areas where his authority was withdrawn.

MS. WEBB: Right.

THE COURT: But I'm not sure the record has evidence that he didn't have activity. You simply have those recitations in the letters informing him that his renewal certification won't include those areas of activity. So I don't see how there's evidence in the record, the agency's record, that will be before the court, at least the record before me, I don't see that it really has evidence to back up what those letters say. Am I overlooking something?

MS. WEBB: No, Your Honor. Not before you, you're correct.

THE COURT: Well, don't I have the same record the Fifth Circuit would have?

MS. WEBB: I haven't -- Your Honor, I haven't thought that far, but I would think that to back up their

letters they would have the 8110-3 showing no activity during that year attached to the administrative record.

THE COURT: Well, they would have to create a new record for the Fifth Circuit. Is that correct?

MS. WEBB: Your Honor, I am so foggy on administrative records. I apologize. I would assume they would attach everything that they had to make this decision would have been the 8110-30s or 8110-3s, and the evaluations, the letters, that all supports that there was no activity in these areas.

THE COURT: What if Mr. Ligon disagrees with that and says that he did engage in activity in those areas? Is there a potential for -

Well, Ms. Fisher, does your client disagree with the conclusion or the findings made by the defendants that your client did not have activity in the areas that were withdrawn, or were not renewed?

MS. FISHER: There would be some argument on the fact of the activities, but also the fact is that the regulations, and even the form that he is to fill out, that he was then made to do more than that. Goes to what they call "other means." And otherwise, you can get a certification renewed based upon activity and/or by other means. And he proved the other means in all areas and/or proved activity in those areas sufficient under the regulation.

THE COURT: Is that proof in the record here?

MS. FISHER: I'm sorry, Your Honor?

THE COURT: Is that proof, Ms. Fisher, in the record I have before me?

MS. FISHER: That is one of the things we have argued is that other means of which to prove it, and that is also in my client's affidavit.

THE COURT: I'm trying to find out -- Well, your client has a lot of generalities in his affidavit. I don't know that there's enough specificity there to prove anything.

Okay. Well, it looks to me like if this were to go to the circuit court because of exclusive jurisdiction, then the circuit court would end up possibly to have a hearing.

Ms. Webb, have you ever run into a situation where the circuit court has held a hearing on cases like this where it has exclusive jurisdiction?

MS. WEBB: No, Your Honor. This is my first case with this -- with this section, so this is new to me.

THE COURT: Well, I assume you've done a lot of work to figure it out by now, haven't you?

MS. WEBB: I've tried, Your Honor.

THE COURT: Well, I've been trying to figure it out, too. Let's go to what may be the more basic question, and it may be that -- If I don't have jurisdiction, that's the reason I raised that issue first. If I don't have jurisdiction to deal with the remaining cause of action, then I shouldn't do it. And I think what

you're contending is I don't have jurisdiction. Is that right, Ms. Webb?

MS. WEBB: Yes, Your Honor.

THE COURT: Well, let's bypass that a minute and go to the merit of the ADEA discrimination and retaliation claims. Of course, for either of those claims to have substance, the fact would have to be that Mr. Ligon was an employee of the government at the time of the event or events that he complains of. You would agree with that, Ms. Fisher?

MS. FISHER: Yes, Judge, I would.

THE COURT: And I think you've got a real problem on that. I've gone through everything I have and I've checked the legal authorities and it appears to me that he's not an employee. At least I don't have evidence in the summary judgment record that would persuade me that he is. Now, I think that goes to the merit of the claim rather than a jurisdictional issue, so we're really bypassing the jurisdictional issue and going to the merit on that ground. Of course, there are other reasons why the government says as a matter of law he can't prevail on those claims, but I'm focussing now on his contention that he's an employee of the government. Of course, he has the burden to prove that if he's going to prevail, and the government has put him to that burden of proof for summary judgment purposes by filing, in effect, a no evidence motion for summary judgment.

One thing that impresses me is what everybody concedes that by regulation and statute his position, the

DER position, is intended to be an independent contractor position. I don't believe there's any question about that. So it seems to me that that's something that has to be given significant weight by the court, that Congress and the administrative agency, both, intended for his position to be an independent contractor position. And he admits that. And he also admits that it was that for what he says 17 years, or something like that?

MS. FISHER: Yes, Your Honor.

THE COURT: Let me find what I'm looking at. So I think the Court has to give some weight, and maybe significant weight, to the intent of the legislator and the intent of the agency. I'm looking at -- Well, you do have a numbering system. I'm looking at your response to the motion to dismiss on page 7, in paragraph under heading II, plaintiff status as an employee, your client says there is no doubt that the position that the plaintiff held as a DER was intended to be as an independent contractor. And then he goes on to say, "In fact, that very independence was necessary for the DERs to make decisions without being controlled by either the FAA or the aircraft industry." Then it goes on to say for 17 years he maintained his independence from the FAA.

And I just haven't found anything that would persuade me that he's not an independent contractor. I think one of the cases that is one of the most recent Fifth Circuit cases on what is or is not an independent contractor relationship is the Arbaugh, A-R-B-A-U-G-H, versus Y&H Corp. case, and it gives the factors that the Court should consider in determining whether there's an employee/employer relationship. And it says

the most important factor is the extent of the employer's right to control the means and manner of the worker's performance.

Well, I can't conclude from the evidence that there's any evidence that the government really had the right to control the means and manner of Mr. Ligon's performance as a DER. They had the right to make known to him if he wasn't performing, just as anybody who hires an independent contractor has the right to make known to the independent contractor that the contractor is not doing the work in accordance with the specifications, for example, if it was a building contractor.

He doesn't have any equipment that he owns, and whatever equipment he uses in the job is his. The government doesn't provide him any equipment. There are regulations he has to comply with, but I don't think the mere fact that he -- that's just like a building contractor having plans and specifications on how to build the building. That doesn't make the building contractor an employee of the person who contracts with the builder to build the building, and I think this situation is similar to that.

Mr. Ligon had the sole responsibility for whatever costs were associated with operating whatever equipment he used in his work. I don't know that there were any license fees and taxes, but if there were taxes it would be income taxes, I suppose, for income he made from it. He, of course, was responsible for that. He was responsible for obtaining whatever kind of insurance might have been required to protect him and others in connection with his work and for providing his own maintenance and supplies. He could determine how long he was going to work each day and the number of days of the week he would work. And I

suppose he could contract with the aircraft people he did work for as to how they would pay and the form of payment.

So I don't know that any of the factors that normally are considered in determining whether somebody is an independent contractor versus an employee favor a finding that he was an employee.

Let me hear from you on that, Ms. Fisher.

MS. FISHER: And there are, of course, issues in there where it would bear that he wouldn't be an independent contractor, but there's also the fact that they started taking control to the point that his hours were limited to the hours they were open and the days that they were open. He had his hours and days limited by the FAA. They began to take control over the testing and telling him what he could and could not do and order tests that he did not recommend. And forced him to do that.

THE COURT: Well, it seems to me that's sort of what I was talking about a minute ago. If you hire a building contractor to build a building, if he doesn't work enough hours

I think you can tell him that you want him to work more hours to get it completed without causing him to become an employee, or you might be able to tell him you don't want him to work at night every night. I don't know that those things are different.

For example, here in the building GSA, General Service Administration, operates this building; and there's an independent contractor hired to do the maintenance work, cleanup work, or cleanup crews. And somebody from GSA periodically inspects to see if it's being done properly, and if the cleanup crew is not

cleaning up what they need to clean up or doesn't show up some night, they may make known to the contractor that they're not doing the work the way they were expected to do i and cause the contractor to respond to those criticisms. In the example I'm talking about I don't think that makes the employees of the contractor employees of the government, nor does it make the contractor an employee of the government. I think that's the sort of thing you're talking about.

MS. FISHER: What they did is they began to micromanage him, and that is also borne out by the affidavit of the other DER who made the distinction between being a contract employee for the State of Oklahoma and how he was treated there versus by FAA who then took control and did micromanage them as DERs in a manner that was distinctly different. And so that's what we have in the evidence, Judge.

THE COURT: Well, I think what -- Of course, it's your client's burden of proof. I don't think there's any evidence to support your client's position on any of the elements that are listed in the Arbaugh case that would be considered in determining whether an independent contractor relationship exists other than conclusory statements. But when it's considered overall, what I get is that your client simply got to the point that he wanted to do things that were outside of what was expected from him as an independent contractor, wanted to do things different from what was expected from him as an independent contractor; and the people who had responsibility to see that he performed properly as an independent contractor made

known to him that they were dissatisfied with some of his conduct.

It appears to me that it was just a deteriorating relationship that started -- it seems to have started when one of his advisors disagreed with -- he and one of his advisors had a disagreement over whether or not an access or exit door on an airplane, or exit panel on an airplane, could be accessed from inside the airplane if the seat was in a certain position. And it seems to me that set it all off, that your client simply didn't like the idea that his advisor took issue with what he was doing in connection with that.

Of course, the FAA and its personnel are charged with the responsibility for the safety of the public and, in particular, the flying public. So I think that needs to be taken into account in determining the degree of supervision they can exercise that would not cause the DERs to become employees contrary to the intent of the legislature and the agency.

Is there anything else, Ms. Fisher, you wanted to say on that subject?

MS. FISHER: This really began when that new advisor, which would be Mr. Bill Vickers, came on board and basically began to treat my client differently. And one of the things, of course, what he's asserting is because he was older. And then when he filed against them and said, "You're treating me differently because I'm older," that's when the memo shows up by Mr. Bill Vickers that he thought my client should be terminated and dealt with his EEOC complaint of age discrimination. And that's where everything begins to

go severely downhill as to what is happening to my client.

And that's why we filed it as an age and retaliation claim. And we have asserted it as an employee due to the degree of control that they took over him as a DER, and it's not an issue as far as safety. One of the things that's important when you look at this is even Vickers, who made all the things and all the comments about safety in his memo, at the end of it there were no regulations, no safety infractions, that he could point to, period.

THE COURT: Okay. Well, it sounds like there must have been a disagreement over what some of the FAA advisors thought would be required for safety, and your client disagreed with that and took issue with it.

What's your thought, Ms. Webb? You're heard her comments.

MS. WEBB: Yes, Your Honor. I did some research and looked at all the elements saying that the high test -- and overriding this is a highly regulated industry for safety reasons. And I think that what little control that Ms. Fisher and her client complains about are really an oversight into a highly regulated industry and I don't think they ever crossed the line making it from an independent contractor to an employee. I think they were doing their duties, and I'm with you, Your Honor. I think there was possibly a personality conflict that started with this Bill Vickers and him asking - or look into charges -- activities.

THE COURT: Ms. Web, there's something happening to your voice. It's cracking up where I'm having a hard time hearing you.

MS. WEBB: I think what it is, Rebecca might be -Ms. Fisher may be on some muscle relaxers and she's breathing in the phone.

MS. FISHER: Oh, I'm sorry.

MS. WEBB: That's okay. If you'll move it away.

MS. FISHER: I apologize. I'm glad you told me that. I'm sitting here trying to write down -

MS. WEBB: Yes, I've been hearing it, but. . .

THE COURT: Ms. Webb, we haven't heard the last several things you've said. One of the things you said was speculation as to what the problem is. What do you think the problem is?

MS. WEBB: I think the problem was that the DER system, Your Honor -

THE COURT: No. Why was I not hearing you? What was that problem?

MS. WEBB: Okay. That's what I'm going to state. The DER system was loose and lax way back when, and the FAA started taking more oversight of the DERs. And to do that they wanted to make sure these DERs were conducting activities, and Bill Vickers, the first advisor, requested Mr. Ligon chart his own activities so that we could make sure he was

doing activities in every area. I think that's where the problem started was between Vickers and Mr. Ligon on how to chart activities. It went down hill concerning the seat to the airplane, and the FAA realized this and moved him over to another advisor, Mr. Rankin, so that there would not be a personality conflict.

But Mr. Rankin had the same problem with Mr. Ligon, and that was not charting his activity and showing activity in these areas. So, yeah, I think your assessment was correct that two people butted heads at FAA and it started going down hill, and even with the change of a new advisor, Mr. Ligon was not going to comply with what the FAA had asked, because they are looking and doing more stringent oversight of these DERs than Mr. Ligon had had before, but for safety purposes .

THE COURT: Well, I think the straw that broke the camel's back was when Mr. Vickers made him sit in that seat and took his photograph while he was sitting in that seat. That was humiliating.

MS. WEBB: Well, I think it was humiliating to him, but, Your Honor, when I questioned the FAA officials, they always put someone in that seat as a demonstration.

THE COURT: I'm not suggesting that his so-called humiliation is justified -

MS. WEBB: Right.

THE COURT: -- but he seems to think that was a very important thing. And it's a recurring thing that he talks about in the different things he presents. So

that probably was not a very good thing from his standpoint.

MS. WEBB: Right. And I think FAA addressed that by giving him another advisor, which was Mr. Rankin.

THE COURT: Well, apparently he wasn't satisfied. Mr. Ligon, you got the idea he wanted to do everything independent of what the advisors considered necessary for safety reasons.

MS. WEBB: I think you're correct there.

THE COURT: And for recertification reasons.

Ms. Fisher, what does he claim -- Let's explore another aspect of the employment ADEA claim. What does he claim the adverse employment action was that caused him to have a claim?

MS. FISHER: Well, for instance, because they require more of him to even get recertification and everything. And I will state that -- and what we put in there is to show that this is not -- Although I know the defendant is asserting they had more oversight, that is not reflected by their policies or their regulations. So they were requiring more of him than the regulations, and that takes up an enormous amount of his time to do.

Furthermore, I know that he's gone into the fact that he had activity and ignore the fact that by their own regulation and paperwork, which was put forth, is that there are other means by which to show and they ignored all of that.

THE COURT: No, that was not my question.

MS. FISHER: I'm sorry.

THE COURT: Maybe somehow or other you're getting around to answering my question, but normally in order to have an ADEA claim there has to be an adverse employment decision affecting the plaintiff that the plaintiff can point to as being something that damaged him. And I'm trying to figure out what that is in this case.

MS. FISHER: When they took away the certifications, that impacted the ability to make money. They also -- I believe this is in the record, but I believe it's in his affidavit.

They took him off the web page, which also causes him to make less money. They used up more of his time on demands that are not placed within the regulations. They stepped out of their own regulations to demand more of him, which takes up more of his time and a considerable amount of time that has to be done.

THE COURT: What do you mean it takes up more of his time? What difference does that make, that it takes up more of his time?

MS. FISHER: What it means is that he has to spend considerable more time to adhere to what they're demanding of him, which is beyond and above their own regulations.

THE COURT: How does that hurt him financially?

MS. FISHER: Well, if you're sitting there taking care of them, you can't do something else that makes

money; and you're doing above and beyond what other DERs are required to do and/or what's in the FAA regulations. I don't have a problem with them regulating DERs or for safety reasons, but they went beyond their own regulations.

THE COURT: Well, I don't know that there's anything that would indicate that an advisor can't use some discretion in determining whether what a DER is doing is appropriate in the performance of the functions the DER is supposed to have. Well, I've spent a lot of time thinking about this and studying the record and I simply can't convince myself that there's evidence in the summary judgment record that would support the factors that are necessary for the Court to find there to be an employee relationship. It seems to me like they all point to an independent contractor relationship throughout the pertinent time, and, of course, it's important, as I said earlier, to bear in mind that Congress intended for it to be an independent contractor relationship and the agency, of course, did, too. And your client understands that that's what was intended from the very beginning, so I think I'm going to grant the summary judgment as to the count having to do with the ADEA discrimination and retaliation claim, which I guess is the only count remaining.

Now, there are other reasons that the government has given in its motion for summary judgment as to why, as a matter of law, he can't prevail on those claims. I'm not going to try to evaluate the merit of those other reasons. It appears that there might well be some merit to them, but I don't know that it would be a productive use of judicial resources to spend time sorting all of that out when it's obvious to

me that Mr. Ligon has not raised a fact issue to support a finding that he was an employee of the government at any of the pertinent times. So I think that takes care of it. I appreciate y'all being on the line.

MS. WEBB: Thank you, Your Honor.

MS. FISHER: We thank you, Judge.

THE COURT: Okay. Thank you.

(Proceedings concluded, 11:07 a.m.)

7/24/2009

CIVIL ACTION N0. 4:08-CV-441-A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

JACK W. LIGON,
Plaintiff,

VS.

RAY LaHOOD, SECRETARY OF DEPARTMENT OF TRANSPORTATION, (FEDERAL AVIATION ADMINISTRATION) AND THE UNITED STATES OF AMERICA,
Defendants .

ORDER

On the date of the signing of this order, the court conducted a telephone conference/hearing on the motions of defendants, Ray LaHood, Secretary of the Department of Transportation (Federal Aviation Administration), and the United States of America, to dismiss for lack of subject matter jurisdiction and for summary judgment. Counsel for plaintiff, Jack W. Ligon, and counsel for defendants were on the line and participated. For the reasons given by the court on the record of such conference/hearing, the court has concluded that both causes of action asserted by plaintiff in his complaint are without merit and should be dismissed.

As to the "U.S. CONSTITUTION-DUE PROCESS" claim asserted in paragraphs 50-52 of

the complaint, the court is ordering a dismissal based on the acknowledgment by plaintiff, through counsel, during the conference/hearing that the claim of constitutional violation lacked merit.

The court is dismissing he claim and cause of action asserted by plaintiff in paragraphs 46-49 of his complaint under the heading "CAUSE of ACTION-AGE DISCRIMINATION & RETALIATION" for the reason that plaintiff has failed to adduce probative evidence that at any relevant time he was an employee of defendants within the meaning of the ADEA. After having considered the status of the summary judgment record as it bears on each of the factors the court is to consider in making a determination of whether an employment relationship exists, as outlined in Arbaugh v. Y & H Corp. 380 F.3d 219, 226 (5th Cir. 2004), the court has concluded that the summary judgment record would not support a finding for plaintiff that he was an "employee" for ADEA purposes at any relevant time. The court, therefore, concludes that defendants' motion for summary judgment should be granted as to the age discrimination and retaliation claims asserted by plaintiff n paragraphs 46-49 of his complaint.

The court has considered each of the other grounds raised by defendants in their motions to dismiss and for summary judgment,
and has concluded that the court need not make a decision as to any of the other grounds in order to finally dispose of the claims and causes of action asserted by plaintiff in his complaint.
Therefore,

The court ORDERS that all claims and causes of action asserted by plaintiff in his complaint be, and are hereby, dismissed.

7/24/2009

CIVIL ACTION N0. 4:08-CV-441-A
IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION

JACK W. LIGON,
Plaintiff,

VS.

RAY LaHOOD, SECRETARY OF DEPARTMENT OF TRANSPORTATION, (FEDERAL AVIATION ADMINISTRATION) AND THE UNITED STATES OF AMERICA,
Defendants .

FINAL JUDGMENT

Consistent with the order signed in the above-captioned action on the date of the signing of this final judgment.,

The court ORDERS, ADJUDGES, and DECREES that all claims and causes of action asserted by plaintiff, Jack W. Ligon, in his complaint against defendants, Ray LaHood, Secretary of the Department of Transportation (Federal Aviation Administration), and the United States of America, in the above-captioned action be, and are hereby, dismissed

No. 09-10860
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JACK W LIGON,
Plaintiff - Appellant

v.

RAY LAHOOD, U S Department of Transportation - Federal Aviation Administration,
Defendant - Appellee

October 14, 2010, Filed

Appeal from the United States District Court for the Northern District of Texas.

Before JOLLY, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

It is ordered that the petition for rehearing is denied.

No. 10-1185

In the Supreme Court of the United States

JACK W. LIGON, PETITIONER

v.

RAYMOND L. LAHOOD, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
MICHAEL P. ABATE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Petitioner, who is a private individual authorized to issue airworthiness certifications on behalf of the Administrator of the Federal Aviation Administration (FAA), 49 U.S.C. 44702(d)(1), 44704, brought suit under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, to challenge an FAA order narrowing the scope of his delegated authority.

The question presented is whether the Federal Aviation Act, which gives the courts of appeals exclusive jurisdiction to review orders related to "to aviation duties and powers designated to be carried out by the Administrator," 49 U.S.C. 46110(a), deprived the district court in this case of jurisdiction over petitioner's age discrimination claims.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 12
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Ahlmeyer v. *Nevada Sys. of Higher Educ.*, 555 F.3d 1051 (9th Cir. 2009) 12
Bivens v. *Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 7, 9, 10, 13, 14
Breen v. *Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007) 15
Brown v. *General Servs Admin.*, 425 U.S. 820 (1976) 8, 12, 14
Chandler v. *Roudebush*, 425 U.S. 840 (1976) 12
Commissioner v. *Schleier*, 515 U.S. 323 (1995) 7
City of Pittsfield v. *EPA*, 614 F.3d 7 (1st Cir. 2010) 13
City of Santa Monica v. *FAA*, 631 F.3d 550 (D.C. Cir. 2011) 13
Cook v. *Pan Am. World Airways, Inc.*, 771 F.2d 635 (1985) 14, 15
Dresser v. *Ingolia*, 307 F. Appx. 834 (5th Cir. 2009) 7
Flamingo Express, Inc. v. *FAA*, 536 F.3d 561 (6th Cir. 2008) 13
Gaunce v. *deVincentis*, 708 F.2d 1290 (7th Cir. 1983), cert. denied, 464 U.S. 978 (1983) 7
Gomez-Perez v. *Potter*, 553 U.S. 474 (2008) 4

Cases—Continued: Page

Green v. *Brantley*, 981 F.2d 514 (11th Cir. 1993) 7
Jones v. *LaHood*, 667 F. Supp. 2d 714 (N.D. Tex. 2009) 8
Jones v. *United States*, 625 F.3d 827 (5th Cir. 2010) 7, 8
Lorance v. *AT&T Techs, Inc* , 490 U.S. 900 (1989) 14
Menard v. *FAA*, 548 F.3d 353 (5th Cir. 2008) 14
Merritt v. *Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999) 7
Newton v. *FAA*, 457 F.3d 1133 (10th Cir. 2006) 13
Paterson v. *Weinberger*, 644 F.2d 521 (5th Cir. 1981) 8, 12, 14
Robinson v *Shell Oil Co.*, 519 U.S. 337 (1997) 16
Schweiker v. *Chilicky*, 487 U.S. 412 (1988) 9, 14
Tur v. *FAA*, 104 F.3d 290 (9th Cir. 1997) 7
Zephyr Aviation, L.L.C. v. *Dailey*, 247 F.3d 565 (5th Cir. 2001) 8, 10

Constitution, statutes and regulations:

U.S. Const. Amend. V 5
Administrative Procedure Act, 5 U.S.C. 706 13
Age Discrimination in Employment Act, 29 U.S.C. 633a ..... *passim*
Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 ..... *passim*
49 U.S.C. 46110 ..... 5, 6, 7, 11, 12
49 U.S.C.46110(a) 3, 11, 12, 13, 14
49 U S C. 46110(c) 3, 13, 16
49 U.S.C. 46110(d) 9, 13
49 U.S.C. 44702(a) 1

Statutes and regulations—Continued: Page

49 U.S.C. 44702(d)(1)(A)-(B) 2
49 U.S.C. 44702(d)(2) 3
28 U.S.C. 1631 11
28 U.S.C. 2412(b) 9
28 U.S.C. 2412(d) 9
42 U.S.C. 2000e-16(a) 8
14 C.F.R.:
Section 13.235 3
Section 183.15 2
Section 183.15(b)(6) 3
Section 183.29 2

Miscellaneous:

FAA Order 8100.8C, http://www.faa.gov/document-Library/media/Order/ 8100.8C%20CHG%201-6.pdf (May 31, 2011) ..... *passim*

In the Supreme Court of the United States

No. 10-1185

JACK W. LIGON, PETITIONER

v

RAYMOND L. LAHOOD, SECRETARY OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 614 F.3d 150. The order of the district court (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2010. A petition for rehearing was denied on October 14, 2010 (Pet. App. 41a). The petition for a writ of certiorari was filed on January 12, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Aviation Act grants to the Administrator of the Federal Aviation Administration (FAA) the authority to issue certificates related to air safety and navigation. 49 U.S.C. 44702(a). It also allows the Ad-

ministrator to delegate "to a qualified private person" the authority to issue such certificates or to perform the tests, examinations, and inspections necessary to their issuance. 49 U.S.C. 44702(d)(1)(A)-(B).

Pursuant to this statutory authority, the Administrator has created the Designated Engineering Representative (DER) program. See 14 C.F.R. 183.29.[1] DERs, as the designees of the Administrator, are empowered to "perform examinations, inspections, and witness tests in the * * * engineering area[]." FAA Order 8100.8C § 300 (2010).[2] The FAA has stated explicitly that DERs, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." *Id* § 300(f). Although DERs are certified by the FAA, they are independent contractors hired by the private aircraft industry to inspect private airplanes. See Pet. App. 2a. DERs are authorized to perform only the tests and inspections for which they are certified (their "authorized areas"). See FAA Order 8100.8C §§ 306, 309. The Administrator may not delegate to DERs the authority to perform any "inherently governmental functions" such as approving "departures from specific policy and guidance, new/unproven technologies, equivalent level of safety findings, special conditions, or exemptions." *Id.* § 300(c).

In most cases, DER certifications must be renewed every year. 14 C.F.R. 183.15; FAA Order 8100.8C §§ 1001(c), 1005; Pet. App. 3a. When applying for recer-

[1] The DER program is only one of many "air designee" programs. As of 2008, the Administrator relied on approximately 11,000 designees to perform a variety of functions.

[2] FAA Order 8100.8C, http://www.faa.gov/documentLibrary/media/Order/8100.8C%20CHG%201-6.pdf (May 31, 2011).

tification, a DER must "provide a brief summary of activity over the previous year," addressing "all technical disciplines in which the DER is authorized." FAA Order 8100.8C § 1005(b). The FAA determines whether to renew the DER's certification based on the "designee's performance[] and the FAA's continued need and ability to manage the appointment." *Id.* § 1000(a). In addition, the Administrator "may rescind a delegation * * * at any time for any reason the Administrator considers appropriate." 49 U.S.C. 44702(d)(2); see also 14 C.F.R. 183.15(b)(6) ("A designation made under this subpart terminates * * * [f]or any reason the Administrator considers appropriate.").

A DER applicant "may appeal a decision regarding a denied or reduced designation" to an administrative Appeal Panel. FAA Order 8100.8C § 600. The Appeal Panel must consider all available information and may interview the applicant or FAA personnel, or may invite other persons to be resources at its deliberations. *Id.* § 601. The panel may decide to "[s]upport the original decision," "[o]verride the original decision," or "[d]irect a repeat of any part of the appointment process." *Id.* § 602. Its decision represents the final decision of the agency. *Id.* § 601. An order from the Appeal Panel qualifies as a final decision of the Administrator. *Ibid.*

The Aviation Act authorizes direct review in the federal courts of appeals of all final decisions of the Administrator with respect to aviation duties and powers. 49 U.S.C. 46110(a) (providing that any "person disclosing a substantial interest in an order issued by * * * the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator * * * may apply for review of the order by filing a petition for re-

view in" the D.C. Circuit or the regional court of appeals within 60 days of the order); see 14 C.F.R. 13.235. The appellate court "has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order," and must defer to the Administrator's findings of fact, which, "if supported by substantial evidence, are conclusive." 49 U.S.C. 46110(c).

2. The Age Discrimination in Employment Act (ADEA) provides that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age * * * in executive agencies as defined in section 105 of Title 5 * * * shall be made free from any discrimination based on age." 29 U.S.C. 633a. This federal-sector provision prohibits both discrimination and retaliation based on age. See *Gomez-Perez* v. *Potter*, 553 U.S. 474, 491 (2008). The Act does not protect those who are neither employed by, nor applying for employment with, an agency of the United States.

3. a. Petitioner is a former FAA employee who first obtained a DER certification in 1983 after retiring from the FAA. Pet. App. 3a. Between 1983 and 2002 he accumulated more than 540 authorized areas of delegated authority. *Ibid.* During his annual renewal process in 2001, the FAA requested that petitioner provide information (in the format of his choosing) regarding the number of certifications he issued on behalf of the Administrator each year in each of his areas of delegated authority. *Ibid.* Petitioner "resisted this additional work, and sought new Advisors who did not require him to report his activities." *Ibid.* In 2003, petitioner finally provided a "rudimentary summary" of his activities, which revealed that he had not performed any certification activity in the area of helicopters. *Id* at 4a. In

2004, petitioner again reported no activity in the area of helicopters, and also showed no activity related to either mechanical or electrical equipment. *Ibid.* The FAA informed petitioner that it would not renew his delegated authorities in those areas if he did not show any relevant certification activity the following year. *Ibid.* Petitioner filed a complaint with the Department of Transportation's Equal Employment Opportunity (EEO) office, alleging retaliation and harassment by the FAA. See *ibid.*

The following year, petitioner again failed to demonstrate any activity related to helicopters, mechanical equipment, or electrical equipment. Pet. App. 4a. The FAA subsequently revoked 226 areas of delegated authority on the grounds of "non-use," *ibid.*, and petitioner filed a second EEO complaint. In 2008, the FAA revoked an additional 88 areas of petitioner's delegated authority for continued inactivity, and petitioner filed a third EEO complaint. *Ibid.*

b. Petitioner neither administratively appealed the FAA's decisions revoking some of his areas of delegated authority, nor filed a petition for review in the court of appeals pursuant to Section 46110 within 60 days of the agency's decisions. Instead, "approximately 90 days after learning of the FAA's decision to further reduce his areas of authority" in 2008, Pet. App. 4a, petitioner filed suit in federal district court seeking injunctive and monetary relief under the ADEA, including reinstatement of his areas of delegated authority, *id.* at 4a-5a.

The government filed a motion to dismiss petitioner's complaint on the ground that the district court lacked jurisdiction over petitioner's ADEA suit in light of the

Aviation Act's exclusive appellate review provision.[3] Gov't C.A. Br. 3. The government also filed a motion for summary judgment, arguing that petitioner could not state a claim under the ADEA because he was neither an employee of, nor an applicant for employment with, the FAA. *Id.* at 4. The district court agreed that petitioner was not an FAA employee and therefore could not make out an ADEA claim, and it resolved the case on that ground without reaching the Secretary's jurisdictional argument. Pet. App. 5a, 39a.[4]

Petitioner moved to amend the judgment, asking the district court to transfer the case to the Fifth Circuit so that he could challenge the Administrator's order under 49 U.S.C. 46110. Pet. App. 5a. The court denied that request. *Ibid.*

c. Petitioner appealed. After initial briefing was complete in the Fifth Circuit, the court of appeals entered an order asking the parties to file supplemental letter briefs addressing two questions:

1. If Plaintiff-Appellant had sought review of the actions complained of through the Federal Aviation Administration's administrative review procedures, could he have been afforded the relief he seeks in this case?

2. In light of your answer to the foregoing question, as well as 49 U.S.C. § 46110, *Zephyr Aviation, L.L.C.* v. *Dailey*, 247 F.3d 565 (5th Cir. 2001), and

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[3] As noted below at pp. 8-10, *infra*, the government withdrew reliance on this jurisdictional argument in the court of appeals.

[4] Petitioner's complaint also included a due process claim under the Fifth Amendment. The court dismissed that claim after petitioner's counsel "acknowleg[ed] that it lacked merit." Pet. App. 5a; see also *id.* at 19a (transcript of telephonic hearing).

> *Dresser* v. *Ingolia*, 307 F. App'x 834 (5th Cir. 2009) (per curiam), did the district court have subject matter jurisdiction over this case?

No. 09-10860 Supp. Briefing Order (5th Cir. Apr. 1, 2010).

In its response, the government first noted that petitioner could have obtained the relief he sought in his ADEA action if he had instead sought review through the FAA's administrative appeal process, including reinstatement of his DER authorities. 4/22/2010 Gov't Supp. C.A. Br. 2-4 (Gov't Supp. C.A. Br.). The brief acknowledged that petitioner could not obtain compensatory damages from that administrative process, but explained that the same was true of his ADEA suit because the ADEA limits a public-sector-employee plaintiff's economic recovery to lost wages. *Id.* at 2; see *Commissioner* v. *Schleier*, 515 U.S. 323, 326 (1995) (compensatory damages not available in ADEA suits against the federal government). Because petitioner earned no wages from the FAA, see Pet. App. 2a (air designees are paid by the private aviation industry), he could obtain no monetary recovery under the ADEA.[5]

As to the second question, the government argued that the court lacked subject matter jurisdiction over petitioner's ADEA claim. Gov't Supp. C.A. Br. 5-11. As it did in district court, the government asserted that petitioner's suit was an impermissible collateral attack upon an FAA order subject to review only as provided in the Aviation Act. *Id.* at 7-8. The government relied on ap-

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[5] In addition, the government noted that under the Equal Access to Justice Act (EAJA), petitioner could have obtained attorney's fees if he had succeeded in either his ADEA action or a petition under the Aviation Act. Gov't Supp. C.A. Br. 3.

pellate decisions holding that district courts lacked jurisdiction over constitutional tort actions filed pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), when such actions were "inescapably intertwined" with aviation orders reviewable under Section 46110. Gov't Supp. Br. 8-11 (citing *Merritt* v. *Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999); *Tur* v. *FAA*, 104 F.3d 290 (9th Cir. 1997); *Green* v. *Brantley*, 981 F.2d 514 (11th Cir. 1993); *Gaunce* v. *deVincentis*, 708 F.2d 1290 (7th Cir.), cert. denied, 464 U.S. 978 (1983); *Dresser* v. *Ingolia*, 307 Fed. Appx. 834 (5th Cir. 2009)).

With permission from the court of appeals, the government subsequently filed a second supplemental brief withdrawing reliance on the jurisdictional argument in this case and in related litigation that was also pending in the Fifth Circuit.[6] 5/14/2010 Gov't 2d Supp. C.A. Br. 4-6. The government's second supplemental brief argued that this Court and the court of appeals had long established that the ADEA (like Title VII of the Civil

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[6] See *Jones* v. *United States*, 625 F.3d 827 (5th Cir. 2010). In *Jones*, the FAA had successfully argued in the district court that the court lacked jurisdiction over a Title VII claim brought by a former FAA employee seeking a DER certification for the first time. See *Jones* v. *LaHood*, 667 F. Supp. 2d 714 (N.D. Tex. 2009). The government's appellate brief in that case withdrew reliance on the jurisdictional argument but argued for affirmance on alternative grounds—namely, that petitioner could not bring a Title VII discrimination claim because he was not an "employee[]" or "applicant[] for employment" for purposes of that statute. See 42 U.S.C. 2000e-16(a). Notwithstanding the government's withdrawal of reliance on the jurisdictional argument, the court of appeals affirmed dismissal for lack of jurisdiction, citing its prior opinion in this case. See *Jones*, 625 F.3d at 830. A petition for a writ of certiorari is also pending in that case. See *Jones* v. *United States*, No. 10-1330 (filed Apr. 26, 2011)

Rights Act of 1964) "provides the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 4 (quoting *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and citing *Paterson* v. *Weinberger*, 644 F.2d 521, 524-525 (5th Cir. 1981)). The brief acknowledged that the government had "modifie[d]" its "prior view on subject matter jurisdiction," but argued that the change was a "narrow" one that did not require a remand to the district court, which had correctly granted summary judgment to the Secretary on the ground that petitioner was not an FAA employee. *Id.* at 4-5.

The government argued that its revised position was consistent with the Fifth Circuit's precedents, including the two cases cited in the supplemental briefing order. 5/14/2010 Gov't 2d Supp. C.A. Br. 5 (citing *Dresser*, *supra*, and *Zephyr Aviation*, *supra*). Those cases, the government explained, concerned whether to extend the judicially created *Bivens* remedy to situations in which potential plaintiffs already possessed a ready mechanism to seek review of FAA aviation orders. *Id.* at 5-6. The court of appeals declined to do so, given this Court's admonition that courts should not extend *Bivens* where there are "special factors counseling hesitation in the absence of affirmative action by Congress." See *id.* at 5 (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). As the government explained, however, the logic of those *Bivens* cases does not control when a plaintiff files suit under the ADEA, because in ADEA cases Congress has expressly authorized an exclusive cause of action to remedy the alleged discrimination. *Id.* at 4.

The government's second supplemental brief also clarified its response to the court's first question regard-

ing the relief available to petitioner. 5/14/2010 Gov't 2d Supp. C.A. Br. 2-4. It noted that a disappointed DER applicant in fact could receive more relief (rather than the same relief) from the administrative process than from an ADEA suit because the Aviation Act gives courts of appeals "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part of [an] order" of the FAA Administrator relating to aviation duties and powers. *Id.* at 3 (brackets in original) (quoting 49 U.S.C. 46110(c)). As a result, a district court would be powerless to modify or reverse an FAA order that was challenged in a discrimination case; if a court found that discrimination had occurred, it could afford a plaintiff only limited relief, such ordering the FAA to consider a new DER application in a discrimination-free process. *Ibid.*[7]

d. Notwithstanding the government's agreement that the district court had jurisdiction over petitioner's ADEA claim, the court of appeals held that the district court lacked subject-matter jurisdiction over petitioner's ADEA claim. Pet. App. 5a-13a. The court reasoned that "[s]pecific grants of jurisdiction to the courts of appeals," like the Aviation Act, "override general grants of jurisdiction to the district courts," like the ADEA. *Id.* at 7a. Thus, the court of appeals concluded that the district court lacked jurisdiction to review the FAA's decision not to renew some of petitioner's areas of authority,

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[7] The government also clarified that, although attorney's fees would be available under EAJA to a successful challenger in either the district court (under the ADEA) or the court of appeals (under the Aviation Act), the conditions for obtaining those fees and the maximum fee available would differ under the terms of EAJA. 5/14/2010 Gov't 2d Supp. C.A. Br. 3-4. A prevailing party in an ADEA suit may recover under 28 U.S.C. 2412(b), whereas a prevailing party in a petition for review may recover under the slightly different terms of 28 U.S.C. 2412(d).

as well as any other claim "inescapably intertwined with a review of the procedures and merits surrounding" that FAA order. *Id.* at 8a (quoting *Zephyr Aviation*, 247 F.3d at 572).

In concluding that the district court lacked jurisdiction over petitioner's claim, the court of appeals relied on cases declining to extend the *Bivens* remedy to cases challenging FAA orders reviewable under the Aviation Act. Pet. App. 8a-11a. The court rejected the argument that those cases are distinguishable under this Court's "special factors" jurisprudence, finding that the "expansion of the *Bivens* remedy is irrelevant here, where the question is circumvention of the exclusive jurisdiction set forth by Congress." *Id.* at 15a n.4. The court did acknowledge, however, that claims against the FAA may proceed in district courts when those claims arise under constitutional or statutory provisions (such as the Federal Tort Claims Act) and seek to challenge an FAA action that is not "inescapably intertwined" with an administrative order. *Id.* at 11a-12a (collecting authorities). The court concluded that petitioner's suit is "inescapably intertwined" with a challenge to the FAA order declining to renew some of his designations of authority, and remanded with instructions that petitioner's claim that the FAA's non-renewal of his areas of authority violated the ADEA be dismissed for lack of jurisdiction. *Id.* at 12a-13a.

Separately, the court of appeals affirmed dismissal of the ADEA claims that did not challenge the non-renewal of petitioner's designated authority—specifically, petitioner's challenge to "the removal of his name from the FAA's online directory of DERs," and his allegations concerning "occasions on which he was required to perform extra work." Pet. App. 12a-14a & n.2. Like the

district court, the Fifth Circuit concluded that petitioner could not state a claim under the ADEA because he "failed to adduce sufficient evidence that he was an employee of the FAA." *Id.* at 13a-14a n.2.

Finally, the court of appeals declined petitioner's invitation to construe his appeal as a petition under the Aviation Act, or to reverse the district court's refusal to "transfer" the ADEA case to the court of appeals under 28 U.S.C. 1631. Noting that petitioner had filed his lawsuit outside of the 60-day window provided for filing a petition for review in the court of appeals under Section 46110, the court of appeals concluded that, even if his "ADEA claim could be construed as a challenge under the Federal Aviation Act," petitioner "provided no reasonable grounds for his failure to file by the 60th day." Pet. App. 15a-16a n.5.[8]

DISCUSSION

Petitioner challenges the court of appeals' holding that the Aviation Act, 49 U.S.C. 46110(a), divests the district court of jurisdiction over petitioner's claim under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* The government agrees with petitioner that the district court had jurisdiction over petitioner's claim. Review of the court of appeals' jurisdictional holding is not warranted in this case, however, both because the holding does not squarely conflict

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[8] On remand, the district court dismissed all of the ADEA claims relating to the non-renewal of petitioner's designated authority for lack of subject-matter jurisdiction. See No. 08-0441, Docket entry No. 53 (N.D. Tex. Nov. 1, 2010). Petitioner has appealed that new judgment, but has asked the Fifth Circuit to stay the briefing schedule during the pendency of this petition for a writ of certiorari. See No. 10-11297, Motion to Stay Proceedings (5th Cir. Mar. 29, 2011).

with the decision of any other court of appeals and because petitioner's claim fails on the independent ground that petitioner was not an FAA employee, as both courts below concluded, and therefore was not covered by the ADEA.

1. As the government explained in its second supplemental brief in the court of appeals, the district court had subject matter jurisdiction over petitioner's age discrimination claims. This Court has held that the analogous anti-discrimination provision of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976), and entitles a federal employee to de novo review of discrimination claims by a trier of fact, *Chandler* v. *Roudebush*, 425 U.S. 840, 864 (1976). The courts of appeals similarly have concluded that the ADEA provides the exclusive judicial remedy for age discrimination claims in federal courts. See *Ahlmeyer* v. *Nevada Sys. of Higher Educ.*, 555 F.3d 1051, 1057 & n.5 (9th Cir. 2009) (collecting authorities); see also *Paterson* v. *Weinberger*, 644 F.2d 521, 524 (5th Cir. 1981) (after the enactment of ADEA's federal-sector provisions in 1974, "the ADEA became the exclusive remedy for age discrimination in federal employment").

The Aviation Act provides that a person seeking review of most final FAA orders may seek review only in the federal courts of appeals. 49 U.S.C. 46110(a).[9] Such

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[9] There is no merit to petitioner's suggestion (Pet. 3, 5) that his ADEA complaint should have been deemed a petition under Section 46110 and transferred to the Fifth Circuit. Petitioner filed suit three years after the FAA's first order revoking some of his areas of delegated authority, and 90 days after the second such order. Pet. App. 4a. Section 46110(a) requires that petitions for review be filed in the court

review is not a substitute for the ADEA and does not preclude a proper ADEA plaintiff from pursuing his claims of age discrimination. When a DER applicant files a petition for review under the Aviation Act, a court of appeals reviews the administrative record concerning the certification application process. Unless an applicant raised his claim of age discrimination in his administrative appeal, such a claim cannot be adjudicated in an action under the Aviation Act seeking review in the court of appeals of the challenged agency action. See 49 U.S.C. 46110(d) (limiting appellate review to only those issues raised in the administrative proceeding). Moreover, under the plain language of the Aviation Act and long-settled principles of administrative law, appellate courts may not conduct de novo review of an order denying a DER certification. Rather, the Administrator's factual findings must be affirmed if supported by substantial evidence, 49 U.S.C. 46110(c), and the agency's ultimate determination must be upheld unless it was arbitrary or capricious.[10]

The court of appeals erred in relying (Pet. App. 8a-11a) on cases holding that courts should not provide a remedy under *Bivens* for individuals seeking to chal-

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of appeals within 60 days absent "reasonable grounds." Petitioner has offered no reasonable ground for his failure to seek review in the court of appeals or for his failure to seek review within 60 days.

[10] Although the Aviation Act is silent on the standard of review applicable to non-factual findings, the courts of appeals have applied the Administrative Procedure Act's deferential standard of review, see 5 U.S.C. 706, to such determinations. See, *e.g.*, *City of Santa Monica* v. *FAA*, 631 F.3d 550, 554 (D.C. Cir. 2011); *City of Pittsfield* v. *EPA*, 614 F.3d 7, 14 (1st Cir. 2010); *Menard* v. *FAA*, 548 F.3d 353, 357 (5th Cir. 2008); *Flamingo Express, Inc.* v. *FAA*, 536 F.3d 561, 567 (6th Cir. 2008); *Newton* v. *FAA*, 457 F.3d 1133, 1136 (10th Cir. 2006).

lenge FAA orders that are otherwise reviewable in the courts of appeals pursuant to 49 U.S.C. 46110(a). The courts in those cases adhered to this Court's admonition that *Bivens* should not be extended into a new context when there are "special factors counselling hesitation in the absence of affirmative action by Congress." *Schweiker*, 487 U.S. at 421. Here, the availability of the administrative appeal process and judicial review under the Aviation Act presents ample reason to hesitate before creating a new judicially inferred cause of action. But in contrast to *Bivens*, the ADEA and Title VII create express—and exclusive, see *Brown*, 425 U.S. at 835; *Paterson*, 644 F.2d at 524—causes of action for discrimination claims alleged by federal employees.

2. Although the court of appeals erred in concluding the district court lacked jurisdiction, this Court's intervention is not warranted in this case, both because the court's decision does not squarely conflict with the decisions of other courts of appeals and because a contrary ruling on the jurisdictional question would have no effect on the outcome of this case.

a. First, there is no division among the courts of appeals about the question presented that would warrant this Court's intervention in this case. Although petitioner does not rely on it, the Fifth Circuit identified one court of appeals decision holding that a district court had jurisdiction over an ADEA suit relating to a final FAA order that was reviewable directly in the courts of appeals pursuant to Section 46110. See Pet. App. 14a n.4. In *Cook* v. *Pan American World Airways, Inc.*, 771 F.2d 635, 642 (1985), abrogated on other grounds by *Lorance* v. *AT&T Technologies, Inc.*, 490 U.S. 900 (1989), the Second Circuit concluded that district courts had jurisdiction over airline employees'

ADEA claims challenging a seniority list that was created as part of an airline merger and approved by the FAA's Civil Aeronautics Board (CAB), even though the CAB's approval of the list also could have been appealed to the court of appeals under the Aviation Act. But to the extent the issue in *Cook* overlaps with the issue in this case, the two courts of appeals applied largely consistent reasoning. In *Cook*, the Second Circuit found that the district court had jurisdiction over the ADEA claims because the administrative agency was not authorized to decide the issues raised in the separate ADEA action. 771 F.2d at 641-642. The court therefore concluded that the ADEA claims did not constitute a "collateral attack" on the CAB's approval of the seniority list. *Id.* at 643. In this case, the court of appeals held that the district court did not have jurisdiction over petitioner's ADEA claims because they were "inescapably intertwined" with the merits of the agency's final action regarding petitioner's status as a DER. Pet. App. 12a. To the extent petitioner raised claims that "could not have been raised in a challenge to a particular order," however, the court held that the district court did have jurisdiction to consider them and affirmed the district court's grant of summary judgment. *Id.* at 13a-14a n.2. There is no conflict between the Second and Fifth Circuits that would warrant this Court's review.[11]

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[11] Although petitioner relies (Pet. 6-7) on the district court's decision in *Breen* v. *Peters*, 474 F. Supp. 2d 1 (D.D.C. 2007), the reasoning of that decision is also consistent with the reasoning of the court below. The district court in *Breen*, like the court below, stated that "[c]ertain FAA administrative orders are reviewable only by the court of appeals," and that "claims that are '"inescapably intertwined" with review of such orders' do not fall within a district court's jurisdiction." *Id.* at 4 (citations omitted). The district court concluded that the ADEA claim

Moreover, the question whether district courts have jurisdiction over employment discrimination claims brought by FAA designees is unlikely to arise with any significant frequency. As discussed at pp. 18-19, *infra*, most such suits are subject to dismissal for failure to state a claim because designees are neither "employees" of nor "applicants for employment" with the FAA.[12] It is not clear in any event why an FAA designee would pursue such a claim under the ADEA or Title VII, since the only remedies available to him are equally available under the Aviation Act. The Aviation Act gives the courts of appeals "exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order" challenged. 49 U.S.C. 46110(c). A district court therefore cannot order the FAA to grant a disappointed applicant the primary relief he is likely to seek—DER authority. See Pet. App. 12a ("[T]he relief [petitioner] seeks—reinstatement of his areas of authority—cannot be granted by a district court reviewing an ADEA claim."). Nor could a court award a DER applicant backpay, because air designees are either independent contractors or full-time private employees, and in either instance are paid directly by a private-sector entity. *Id.* at 2a. The only types of relief a DER applicant could obtain in an ADEA suit would be a finding of discrimination; an order requiring the FAA to consider a new DER applica-

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of the FAA employee in that case was not inescapably intertwined with the FAA's decision to outsource certain flight service activities to private entities in part because the employee did not have an opportunity to raise an age discrimination claim in his administrative appeal. *Id.* at 6.

[12] In some cases, an applicant who is a former FAA employee may be able to state a post-employment retaliation claim under the ADEA or Title VII. See, *e.g.*, *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997).

tion in a discrimination-free process; and, possibly, attorney's fees under EAJA.

b. This case would not be a suitable candidate for review in any event, since petitioner's ADEA claim fails on an independent ground: as both courts below concluded, petitioner was a DER, not an employee of the FAA, and therefore was not covered by the ADEA. Pet. App. 13a-14a n.2 (court of appeals); *id.* at 36a, 39a (district court).

DERs are skilled independent contractors who, "while acting pursuant to their appointment, are representatives of the Administrator for specified functions and ARE NOT considered employees of the FAA." FAA Order 8100.8C § 300(f). DERs are not permitted to perform certain "inherently governmental functions" that "cannot be delegated to a designee." *Id.* § 300(c). Moreover, the FAA does not set DERs' work schedules, does not actively supervise the work performed by DERs, and does not provide them with any equipment or office space. See Pet. App. 27a-28a; Gov't C.A. Br. 10-11. Designees collect no salary or benefits from the FAA. Gov't C.A. Br. 10. Instead, they are paid by private aviation companies. Pet. App. 2a. In fact, some DERs are full-time employees of private companies. FAA Order 8100.8C § 307 (discussing "Company DER" certification). And if a current FAA employee wishes to become a designee, he must resign from the FAA before obtaining DER certification. *Id.* § 402.

The district court in this case correctly concluded that, although it had subject matter jurisdiction over petitioner's ADEA claims, the government was entitled to summary judgment because petitioner had failed to establish that he was an employee of the FAA. Pet. App. 39a. Although the court of appeals concluded that

the district court lacked jurisdiction over certain claims, it concluded that the district court properly exercised jurisdiction over other claims, but that those claims failed because petitioner "failed to adduce sufficient evidence that he was an employee of the FAA." *Id.* at 13a n.2. Petitioner does not seek review of that holding. Because petitioner is not an employee entitled to adjudication of his ADEA claims, this Court's review of the court of appeals' jurisdictional holding is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
MICHAEL P. ABATE
Attorneys

MAY 2011

188

(2)

Supreme Court, U.S.
FILED
JUN 13 2011
OFFICE OF THE CLERK

No. 10-1185

IN THE

Supreme Court of the United States

JACK LIGON,
Petitioner,

v.

RAY LAHOOD, SECRETARY OF DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

REBECCA L. FISHER
Counsel of Record
REBECCA L. FISHER & ASSOCIATES
P.O. Box 417
McGregor, Texas 76657
(254) 840-0220
rfisher@hot.rr.com

Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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PETITIONER REPLY TO THE RESPONDENT'S BRIEF IN OPPOSITION

Petitioner, Jack W. Ligon, respectfully submits this Reply to the Respondent's Brief in Opposition. The question in this case is whether the jurisdiction conferred by the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 633(a), is displaced by a provision of the Federal Aviation Act (Aviation Act) granting the Courts of Appeal exclusive jurisdiction to review orders related "to aviation duties and powers designated to be carried out by the administrator" of the FFA, 49 U.S.C. § 46110. The Petitioner would also like to draw the Court's attention to a subsequent filed Petition for a Writ of Certiorari in

10-1330, *Jones v. United States,* whereby the exclusivity of the federal sector jurisdiction provisions of Title VII, 42 U.S.C. § 2000e-16, is displaced by the Aviation Act.[1]

Petitioner Ligon, as well as Petitioner Jones, and the Solicitor General agree that ADEA and Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment". *See BIO, #10-1185 Ligon vs LaHood 9. Also see BIO, #10-1330 Jones vs United States 11.* Petitioner Ligon and Petitioner Jones have also asserted that *Bivens* cases do not control when a Plaintiff files suit under ADEA or Title VII. Likewise, the Solicitor General clearly states the same. *Id.* The Lower Court in both Ligon and Jones improperly based their reasoning for displacing and/or preempting ADEA and Title VII with the Aviation act on *Bivens* cases.

Both the Government and Petitioners Ligon and Jones have asserted that the District Courts have exclusive jurisdiction over a discrimination claim, either under ADEA or Title VII, but this was rejected by the Lower Court. Although, the Government asserted that a disappointed DER Applicant in fact could receive the same relief or even more relief from the administrative process than from an ADEA suit, that is immaterial, since exclusive jurisdiction over discrimination and retaliation claims is maintained by the District Courts.

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[1] Prior the filing of the Petition for Writ of Certiorari in this case, there was a previously filed Petition in 10-374, *Zuress v. Donley*, whereby Petitioner Zuress' Title VII claim was barred by the extra-statutory principle that military employees may not bring suits that are "integrally related" to their military service.

Furthermore, Petitioner cites to his Petition for Writ of Certiorari and Petitioner Jones' Writ of Certiorari, as well as Petitioner Jones' Reply, which clearly outlines the split in the jurisdiction regarding the issue of the exclusivity of the federal sector jurisdiction provisions of Title VII and ADEA. This is a question which clearly needs to be answered and resolved by this Court. This Court's decision will have significance to those who are in federal sector employment and who seek redress for discriminatory actions. Furthermore, as noted in Petitioner's Brief, the Lower Court's decision weakens ADEA when the American workforce, including federal employees, is an aging workforce in need of ADEA's protection.[2]

Petitioner Ligon has requested that the threshold issue of whether or not he is an employee be determined, which would then determine whether he should proceed under ADEA with the exclusive jurisdiction given to the District Courts or whether Petitioner Ligon should proceed under the Federal Aviation Act to address the decertification of his designated authorities. Petitioner Ligon has requested that if he is determined not an employee and there-

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[2] The Respondent's BIO on Pg. 6, footnote 4 assets that Petitioner's complaint, which had included a due process claim that was dismissed after Petitioner's Counsel "acknowledged that it lacked merit." Although Respondent's footnote is not material regarding the question now before this Court, Petitioner does wish to address the Respondent's footnote. It is not correct. Petitioner's Counsel never stated that the due process claim had lacked merit. Petitioner's Counsel even requested the Court to change that entirely false statement in the Motion to Amend Judgment. [Doc. 42]. The Court did not do so. Furthermore, one can look at the transcript of the telephonic hearing and note that there is no such acknowledgment by Petitioner's Counsel. In an abundance of caution, Petitioner's Counsel strongly rebuts this false statement.

fore not subject to ADEA, that his decertification under the Aviation Act be transferred from the District Court to the Court of Appeals under 28 U.S.C. § 1631.

There needs to be an answer regarding the exclusivity of the federal sector jurisdictional provisions of ADEA and Title VII, and the relevance of whether or not Petitioner Ligon is an employee subject to ADEA's exclusive jurisdiction. Petitioner, in compliance with ADEA, was mandated to exhaust certain administrative provisions, which he did, before he could file an ADEA suit. If Petitioner Ligon is not subject to ADEA, his case should have been transferred to the Court of Appeals under 28 U.S.C § 1631. Certainly the determination of whether Petitioner Ligon was subject to ADEA or to the Federal Aviation Act is reasonable grounds for the failure to file within sixty (60) days, since at all times, the Petitioner was timely in processing his ADEA claims. Petitioner request that the Court grant Certiorari in this case so that the important question of whether the jurisdiction conferred by ADEA and by Title VII is displaced/prempted by provision of the Federal Aviation Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

REBECCA L. FISHER
Counsel of Record
REBECCA L. FISHER & ASSOCIATES
P.O. Box 417
McGregor, Texas 76657
(254) 840-0220
rfisher@hot.rr.com

June 2011

Attorney for Petitioner